

Smith's Bakeries-Hillcrest and United Food and Commercial Workers International Union, Local 1036, AFL-CIO, CLC. Case 31-CA-20116

February 9, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

Upon a charge filed by the Union on September 3, 1993, the General Counsel of the National Labor Relations Board issued a complaint on October 18, 1993, against Smith's Bakeries-Hillcrest, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On December 20, 1993, the General Counsel filed a Motion for Summary Judgment with the Board. On December 22, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On January 10, 1994, the Charging Party joined the Motion for Summary Judgment. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated November 19, 1993, notified the Respondent that unless an answer were received by December 3, 1993, a Motion for Summary Judgment would be filed. On December 3, 1993, counsel for the General Counsel received a telephone call from a man who identified himself as Alex Esparza, a representative of the Respondent. Esparza admitted that the Respondent had received the General Counsel's November 19 letter and that the Respondent had not filed any answer. Counsel for the General Counsel advised Esparza that the General Counsel intended to file a Motion for Summary Judgment if the Respondent did not file an answer, but told Esparza that the Respondent had until the close of business on December 6, 1993, to indicate whether or not the Respondent intended to file an answer. Esparza promised to call the General Counsel to so indicate before the close of business on December 6. Counsel for the Gen-

eral Counsel informed Esparza that a Motion for Summary Judgment would be filed immediately if Esparza did not do so or if the Respondent did not otherwise contact the General Counsel. On December 6, 1993, after Esparza failed to call as promised, counsel for the General Counsel telephoned Esparza twice and left messages asking Esparza to call. Esparza has failed to answer or otherwise to respond to the complaint.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a sole proprietorship with places of business in Bakersfield and Lamont, California, is engaged in the operation of retail bakery stores. Respondent, in the course and conduct of its business operations, annually purchases and receives goods or services valued in excess of \$50,000 from sellers or suppliers located within the State of California, which sellers or suppliers receive such goods in substantially the same form directly from outside the State of California. Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of \$500,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Full and regular part-time bakery clerks and bakers employed by the Employer at its facilities located at 2940 Niles Street, 1707 Columbus Avenue, and 3719-B4 Wilson Road in Bakersfield, California, and 10415 Main Street in Lamont, California, excluding all casual employees, seasonal employees, packers or employees performing packing duties, guards, and supervisors as defined in the Act.

On or about March 19, 1993, a majority of the employees of the Respondent in the unit described above, by a secret ballot election conducted in Case 31-RC-7023 under the supervision of the Regional Director for Region 31 of the National Labor Relations Board, designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent, and on or about March 29, 1993, the Regional Director certified the Union as the exclusive

collective-bargaining representative of the employees in the unit.

At all times since March 29, 1993, and continuing to date, the Union has been the exclusive representative for the purposes of collective bargaining of the employees in the unit described above, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all the employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On or about August 8, 1993, the Respondent terminated the existing health insurance plan for the unit described above. This subject relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject for the purposes of collective bargaining. The Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit described above, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by unilaterally terminating the existing health insurance plan for its unit employees, we shall order the Respondent to restore the health insurance plan existing on August 8, 1993. In addition, we shall order the Respondent to reimburse these employees for any health, medical, or any other expenses ensuing from the Respondent's failure to continue the health insurance plan existing on or about August 8, 1993. This shall include reimbursing employees for any premiums they may have paid to third-party insurance companies to continue such insurance coverage in the absence of the health insurance plan existing on or about August 8, 1993, and for any health or medical bills they have paid directly to health care providers that the health insurance plan would have covered. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest as

prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Smith's Bakeries-Hillcrest, Bakersfield and Lamont, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally terminating the existing health insurance plan for the employees in the following unit:

Full and regular part-time bakery clerks and bakers employed by the Employer at its facilities located at 2940 Niles Street, 1707 Columbus Avenue, and 3719-B4 Wilson Road in Bakersfield, California, and 10415 Main Street in Lamont, California, excluding all casual employees, seasonal employees, packers or employees performing packing duties, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate the existing health plan for the unit employees that was unlawfully terminated on or about August 8, 1993.

(b) Make unit employees whole for any loss of benefits or other expenses suffered as a result of the Respondent's unlawful termination of the existing health insurance plan, as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Bakersfield and Lamont, California, copies of the attached notice marked "Appendix."¹ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. February 9, 1994

James M. Stephens, Chairman

Dennis M. Devaney, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally terminate the health insurance plan in effect on or about August 8, 1993, for our employees in the following unit:

Full and regular part-time bakery clerks and bakers employed by us at our facilities located at 2940 Niles Street, 1707 Columbus Avenue, and 3719-B4 Wilson Road in Bakersfield, California, and 10415 Main Street in Lamont, California, excluding all casual employees, seasonal employees, packers or employees performing packing duties, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate the existing health plan for the unit employees that was unlawfully terminated on or about August 8, 1993.

WE WILL make our unit employees whole for any loss of benefits or other expenses suffered as a result of our unlawful termination of the existing health plan on or about August 8, 1993.

SMITH'S BAKERIES-HILLCREST